

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jul 21, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SHELENA B.,

Plaintiff,

v.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

No. 1:19-CV-03146-JTR

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 13, 14. Attorney D. James Tree represents Shelena B. (Plaintiff); Special Assistant United States Attorney L. Jamala Edwards represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **DENIES** Plaintiff's Motion for Summary

<sup>1</sup>Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 Judgment and **GRANTS** Defendant's Motion for Summary Judgment.

2 **JURISDICTION**

3 Plaintiff filed an application for Supplemental Security Income (SSI) on  
4 September 23, 2014, Tr. 91, alleging disability since May 30, 2014, Tr. 252, due to  
5 equinus, plantar fasciitis, Baxter's neuritis, carpal tunnel, attention deficit  
6 hyperactive disorder (ADHD), personality disorder, and borderline intellectual  
7 functioning, Tr. 326. The applications were denied initially and upon  
8 reconsideration. Tr. 112-16, 118-20. Administrative Law Judge (ALJ) Moria  
9 Ausems held a hearing on March 13, 2018 and heard testimony from Plaintiff and  
10 vocational expert Fred Cutler. Tr. 37-65. The ALJ issued an unfavorable decision  
11 on May 7, 2018 finding Plaintiff was not disabled from September 23, 2014  
12 through the date of the decision. Tr. 15-27. The Appeals Council denied review  
13 on May 1, 2019. Tr. 1-5. The ALJ's May 7, 2018 decision became the final  
14 decision of the Commissioner, which is appealable to the district court pursuant to  
15 42 U.S.C. §§ 405(g), 1383(c). Plaintiff filed this action for judicial review on June  
16 26, 2019. ECF No. 1.

17 **STATEMENT OF FACTS**

18 The facts of the case are set forth in the administrative hearing transcript, the  
19 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
20 here.

21 Plaintiff was 27 years old at the date of application. Tr. 252. Plaintiff  
22 completed her GED in 2002. Tr. 327. Her reported work history includes the jobs  
23 of cashier, housekeeping, and laborer. *Id.* When applying for benefits Plaintiff  
24 reported that she stopped working on May 30, 2014 because of her conditions Tr.  
25 326.

26 **STANDARD OF REVIEW**

27 The ALJ is responsible for determining credibility, resolving conflicts in  
28 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,

1 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
 2 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
 3 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
 4 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
 5 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
 6 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
 7 another way, substantial evidence is such relevant evidence as a reasonable mind  
 8 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S.  
 9 389, 401 (1971). If the evidence is susceptible to more than one rational  
 10 interpretation, the court may not substitute its judgment for that of the ALJ.  
 11 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative  
 12 findings, or if conflicting evidence supports a finding of either disability or non-  
 13 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d  
 14 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial  
 15 evidence will be set aside if the proper legal standards were not applied in  
 16 weighing the evidence and making the decision. *Browner v. Secretary of Health*  
 17 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

### 18 SEQUENTIAL EVALUATION PROCESS

19 The Commissioner has established a five-step sequential evaluation process  
 20 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*  
 21 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of  
 22 proof rests upon the claimant to establish a prima facie case of entitlement to  
 23 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the  
 24 claimant establishes that physical or mental impairments prevent her from  
 25 engaging in her previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant  
 26 cannot do her past relevant work, the ALJ proceeds to step five, and the burden  
 27 shifts to the Commissioner to show (1) the claimant can make an adjustment to  
 28 other work, and (2) the claimant can perform specific jobs that exist in the national

1 economy. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th  
 2 Cir. 2004). If the claimant cannot make an adjustment to other work in the  
 3 national economy, she is found “disabled.” 20 C.F.R. § 416.920(a)(4)(v).

#### 4 ADMINISTRATIVE DECISION

5 On May 7, 2018, the ALJ issued a decision finding Plaintiff was not disabled  
 6 as defined in the Social Security Act from September 23, 2014 through the date of  
 7 the decision.

8 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
 9 activity since September 23, 2014, the date of application. Tr. 17.

10 At step two, the ALJ determined that Plaintiff had the following severe  
 11 impairments: obesity; bilateral carpal tunnel syndrome; intermittent plantar  
 12 fasciitis; acquired bilateral pes planus; borderline intellectual functioning;  
 13 adjustment disorder; major depressive disorder or bipolar disorder; posttraumatic  
 14 stress disorder; somatic symptom disorder; avoidant personality disorder; ADHD;  
 15 methamphetamine dependence; cannabis dependence; cocaine disorder; and  
 16 alcohol dependence. Tr. 17.

17 At step three, the ALJ found that Plaintiff did not have an impairment or  
 18 combination of impairments that met or medically equaled the severity of one of  
 19 the listed impairments. Tr. 19.

20 At step four, the ALJ assessed Plaintiff’s residual function capacity and  
 21 determined that she could perform a range of light work with the following  
 22 limitations:

23 The claimant is precluded from using ladders, ropes, or scaffolds. The  
 24 claimant is unable to balance on uneven terrain. The claimant must  
 25 avoid even moderate exposure to industrial vibration sustained through  
 26 the hands. The claimant is precluded from exposure to unprotected  
 27 heights, dangerous machinery, or commercial driving. The claimant is  
 28 limited to frequent bilateral fingering. The claimant can complete  
 simple, routine tasks that are predictable and repetitive in nature. The

1 claimant could not tolerate more than brief, superficial interaction with  
2 the public, or tolerate tandem tasks with coworkers.

3 Tr. 20-21. The ALJ found Plaintiff had no past relevant work. Tr. 25.

4 At step five, the ALJ determined that, considering Plaintiff's age, education,  
5 work experience and residual functional capacity, and based on the testimony of  
6 the vocational expert, there were other jobs that exist in significant numbers in the  
7 national economy Plaintiff could perform, including the jobs of housekeeper,  
8 agricultural produce sorter, and bottling line attendant. Tr. 26. The ALJ concluded  
9 Plaintiff was not under a disability within the meaning of the Social Security Act  
10 from September 23, 2014, through the date of the ALJ's decision. Tr. 27.

### 11 ISSUES

12 The question presented is whether substantial evidence supports the ALJ's  
13 decision denying benefits and, if so, whether that decision is based on proper legal  
14 standards. Plaintiff contends the ALJ erred by failing to properly weigh (1) the  
15 medical opinions in the record, (2) a lay witness statement, and (3) Plaintiff's  
16 symptom statements.

### 17 DISCUSSION

#### 18 1. Medical Opinions

19 Plaintiff argues that the ALJ failed to properly consider and weigh the  
20 medical opinions expressed by Mark Duris, Ph.D., Thomas Genthe, Ph.D., and  
21 Brooke Sjostrom, LMHC. ECF No. 13 at 13-18.

22 In weighing medical source opinions, the ALJ should distinguish between  
23 three different types of physicians: (1) treating physicians, who actually treat the  
24 claimant; (2) examining physicians, who examine but do not treat the claimant;  
25 and, (3) nonexamining physicians who neither treat nor examine the claimant.  
26 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more  
27 weight to the opinion of a treating physician than to the opinion of an examining  
28 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ

1 should give more weight to the opinion of an examining physician than to the  
2 opinion of a nonexamining physician. *Id.*

3 When an examining physician's opinion is not contradicted by another  
4 physician, the ALJ may reject the opinion only for "clear and convincing" reasons,  
5 and when an examining physician's opinion is contradicted by another physician,  
6 the ALJ is only required to provide "specific and legitimate reasons" to reject the  
7 opinion. *Lester*, 81 F.3d at 830-31. The specific and legitimate standard can be  
8 met by the ALJ setting out a detailed and thorough summary of the facts and  
9 conflicting clinical evidence, stating her interpretation thereof, and making  
10 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is  
11 required to do more than offer her conclusions, she "must set forth [her]  
12 interpretations and explain why they, rather than the doctors', are correct."  
13 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

14 **A. Mark Duris, Ph.D.**

15 On June 24, 2014, Dr. Duris examined Plaintiff and provided an opinion to  
16 the Washington State Department of Social and Health Services (DSHS) on a  
17 Psychological/Psychiatric Evaluation form. Tr. 647-51. He diagnosed Plaintiff  
18 with methamphetamine dependence in sustained partial remission, borderline  
19 intellectual functioning, and personality disorder not otherwise specified. Tr. 649.  
20 He opined that Plaintiff had marked limitations in the abilities to complete a  
21 normal work day and work week without interruptions from psychologically based  
22 symptoms and to set realistic goals and plan independently. *Id.* He also opined  
23 that Plaintiff had moderate limitations in the abilities to communicate and perform  
24 effectively in a work setting and to maintain appropriate behavior in a work  
25 setting. *Id.* He rated the remaining basic work activities as none or mild. *Id.* He  
26 stated that Plaintiff's impairments would last nine to twelve months with available  
27 treatment. Tr. 650.

28 The ALJ assigned different weight to different portions of the opinion. Tr.

23. First, the ALJ assigned partial weight to the no more than moderate limitations in the areas of communicating and performing effectively and maintaining appropriate behavior in a work setting stating the following:

While these opinions have been incorporated into the assessment of mental residual functional capacity in this decision to a significant degree, the longitudinal medical evidence and reviewed as a whole does not establish a degree of psychological abnormality that could reasonably be considered inconsistent with an ability to maintain basic appropriate behavior and effective functioning in a work setting involving simple routine tasks and minimal interaction with others.

Tr. 23. The ALJ then assigned no weight to the marked mental limitations in completing a normal work day and work week and setting realistic goals and planning independently stating the following:

These check-marked opinions in this record are not supported by the relatively benign mental status findings set forth in the narrative portion of his brief report and, therefore, suggest undue reliance upon subjective allegations rather than objective medical evidence. Moreover, the conclusions in this regard are contradicted by the stable mental status findings documented by other treating and examining medical sources of record and by the claimant's independent performance of a wide range of activities of daily living.

Tr. 23-24.

Plaintiff argues that the ALJ failed to set forth any specific evidence that contradicted or undermined Dr. Duris' opinion. ECF No. 13 at 13. Plaintiff correctly cites to *Brown-Hunter v. Colvin*, in asserting that while the ALJ is not required to explain her decision with "ideal clarity," she is required to "set forth the reasoning behind its decisions in a way that allows for meaningful review." 806 F.3d 487,492 (9th Cir. 2015). "A clear statement of the agency's reasoning is necessary because we can affirm the agency's decision to deny benefits only on the grounds invoked by the agency." *Id.*



1 Here, the ALJ clearly stated how the opined limitations were either  
2 incorporated or not in the residual functional capacity determination. First, the  
3 ALJ identified the limitations in communicating and performing effectively and  
4 maintaining appropriate behavior, and found that while the limitations were  
5 present, they were not work preclusive and they were incorporated into the residual  
6 functional capacity determination as such. Tr. 23. These limitations were opined  
7 as moderate, which is defined on the form as “there are significant limits on the  
8 ability to perform one or more basic work activity.” Tr. 649. The ALJ interpreted  
9 this to be consistent with a limitation to simple routine tasks that are predictable  
10 and repetitive in nature, and no more than brief, superficial interaction with the  
11 public or tandem tasks with coworkers. Tr. 20-21. This is a reasonable  
12 interpretation of the moderate limitations opined. Therefore, the Court will not  
13 disturb the ALJ’s treatment of the opined moderate limitations. *See Tackett*, 180  
14 F.3d at 1097 (If the evidence is susceptible to more than one rational interpretation,  
15 the court may not substitute its judgment for that of the ALJ.).

16 Next, the ALJ rejected the opined marked limitations because they appeared  
17 to be premised on Plaintiff’s self-reports. Tr. 23-24. A doctor’s opinion may be  
18 discounted if it relies on a claimant’s unreliable self-report. *Bayliss v. Barnhart*,  
19 427 F.3d 1211, 1217 (9th Cir. 2005); *Tommasetti v. Astrue*, 533 F.3d 1035, 1041  
20 (9th Cir. 2008). But the ALJ must provide the basis for her conclusion that the  
21 opinion was based on a claimant’s self-reports. *Ghanim v. Colvin*, 763 F.3d 1154,  
22 1162 (9th Cir. 2014). Here, the ALJ found that the limitations “are not supported  
23 by the relatively benign mental status findings set forth in the narrative portion of  
24 his brief report and, therefore, suggest undue reliance upon subjective allegations  
25 rather than objective medical evidence.” Tr. 24. Therefore, she provided the  
26 required basis for her conclusion. The ALJ was accurate that the examination  
27 showed rather benign findings, including a normal mental status examination. Tr.  
28 650-51. Therefore, this reason is supported by substantial evidence and meets the



1 required specific and legitimate standard required to reject the opinion of a  
2 contradicted<sup>2</sup> examining psychologist.

3 The ALJ also stated that these marked limitations were on a check-mark  
4 form. Tr. 23. The Ninth Circuit has expressed a preference for narrative opinions  
5 over opinions expressed on a check-the-box form. *See Murray v. Heckler*, 722  
6 F.2d 499, 501 (9th Cir. 1983). However, check-the-box forms that do not stand  
7 alone, but are supported by records should be “entitled to weight that an otherwise  
8 unsupported and unexplained check-box form would not merit.” *Garrison v.*  
9 *Colvin*, 759 F.3d 995, 1013 (9th Cir. 2014). Here, the ALJ simply commented that  
10 the opinion was on a check-mark form, but did not conclude this was a reason to  
11 reject the opinion. Therefore, this comment by the ALJ fails to meet the specific  
12 and legitimate standard.

13 Additionally, the ALJ found that these marked limitations were inconsistent  
14 with the other evidence in the record and Plaintiff’s reported activities.  
15 Inconsistency with the majority of objective evidence is a specific and legitimate  
16 reason for rejecting physician’s opinions, *Batson*, 359 F.3d at 1195, and a  
17 claimant’s testimony about her daily activities may be seen as inconsistent with the  
18 presence of a disabling condition, *Curry v. Sullivan*, 925 F.2d 1127, 1130 (9th Cir.  
19 1990). However, here the ALJ failed to set forth what evidence undermined the  
20 opinion and what activities demonstrated Plaintiff was more capable than opined.  
21 Therefore, these reasons also fall short of the specific and legitimate standard.

22 Since the ALJ provided at least one specific and legitimate reason for  
23 rejecting the opined marked limitations, the Court will not disturb her treatment of  
24 the opinion. *See Tommasetti*, 533 F.3d at 1038 (An error is harmless when “it is  
25 clear from the record that the . . . error was inconsequential to the ultimate  
26

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27 <sup>2</sup>The opined marked limitations are contradicted by the opinions of James  
28 Bailey, Ph.D., Tr. 86-88, and John F. Robinson, Ph.D., Tr. 102-03.

1 nondisability determination.”).

2 **B. Thomas Genthe, Ph.D.**

3 On August 13, 2014, Dr. Genthe examined Plaintiff and completed a  
4 Psychological/Psychiatric Evaluation for DSHS. Tr. 652-60. He diagnosed  
5 Plaintiff with ADHD, methamphetamine use disorder in sustained remission,  
6 cannabis use disorder in sustained remission, and alcohol use disorder in sustained  
7 remission. Tr. 654. He opined that Plaintiff had a marked limitation in the  
8 abilities to perform routine tasks without special supervision, to complete a normal  
9 work day and work week without interruptions from psychologically based  
10 symptoms, to maintain appropriate behavior in a work setting, and to set realistic  
11 goals and plan independently. Tr. 654-55. He also opined that Plaintiff had a  
12 moderate limitation in seven additional areas of basic work activity. *Id.* He  
13 concluded the opinion as follows:

14 At this time, she is unlikely to function adequately in a work setting  
15 until her psychological symptoms have been managed more effectively.  
16 Given her response to treatment, and willing participation, a period of  
17 4-6 months may likely be sufficient to address her treatment needs at  
18 least moderately well, and help her regain the necessary emotional  
functioning to resume fulltime work related activities.

19 Tr. 655.

20 Dr. Genthe examined Plaintiff a second time on June 6, 2017 and completed  
21 a second Psychological/Psychiatric Evaluation form for DSHS on June 14, 2017.  
22 Tr. 873-81. He opined Plaintiff had a severe limitation in the ability to adapt to  
23 changes in a routine work setting and a marked limitation in the abilities to  
24 understand, remember, and persist in tasks by following detailed instructions, to  
25 perform activities within a schedule, maintain regular attendance, and be punctual  
26 within customary tolerances without special supervision, to learn new tasks, to  
27 maintain appropriate behavior in a work setting, and to complete a normal work  
28 day and work week without interruptions from psychologically based symptoms.

1 Tr. 876-77. He opined that Plaintiff had a moderate limitation in the remaining  
2 seven basic work activities. *Id.* He ended this opinion with the following  
3 statement:

4       At this time, [Plaintiff] is unlikely to function adequately in a work  
5 setting until her psychological symptoms have been managed more  
6 effectively. Given her response to treatment, and willing participation,  
7 a period of nine months may likely be sufficient to address her  
8 treatment needs at least moderately well, and help her regain the  
9 necessary emotional functioning to resume fulltime work related  
activities.

10 Tr. 877.

11       The ALJ stated that the 2014 opinion was “largely reiterated in his 2017  
12 assessment,” and gave the opinions partial weight stating the following:

13       Although Dr. Genthe’s [sic] indicated the claimant was markedly  
14 limited in multiple areas, he conceded lack of treatment was a major  
15 factor, and opined the claimant’s impairments would not be of such  
16 severity if she were properly treated, subsiding as quickly as four  
17 months. This is generally consistent with the claimant’s own indication  
18 treatment improved her symptoms, and is reasonably consistent with  
overall moderate limitations when treated.

19 Tr. 24.

20       Generally, the fact that a condition can be remedied by medication is a  
21 legitimate reason for discrediting an opinion. *Warre v. Comm’r of Soc. Sec.*  
22 *Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). Failure to follow a course of  
23 treatment may be excused, however, if the claimant’s noncompliance is  
24 attributable to her mental illness, *Molina v. Astrue*, 674 F.3d 1104, 1114 (9th Cir.  
25 2012). Plaintiff argues that the ALJ ignored Dr. Genthe’s opinion that she was  
26 unlikely to follow through with treatment due to her poor insight and  
27 understanding about her condition. ECF No. 13 at 16-17. However, Dr. Genthe  
28 does not appear to attribute Plaintiff’s lack of treatment to poor insight and

1 understanding at her first evaluation: “Her insight about her clinical issues and  
2 treatment options was assessed as fair,” Tr. 656. By the second evaluation, Dr.  
3 Genthe found that Plaintiff’s level of understanding about the factors contributing  
4 to her illness was poor, her level of understanding of her need for treatment was  
5 poor, and the potential that she would be treatment compliant was fair to poor. Tr.  
6 880. Despite this statement, Dr. Genthe found Plaintiff’s prognosis as fair and  
7 opined that a period of nine months may be sufficient to address her treatment  
8 needs and allow her to resume fulltime work. Tr. 877. Therefore, the ALJ’s  
9 conclusion that the opined limitations would improve with treatment is a  
10 reasonable interpretation of the evidence. The Court will not disturb the ALJ’s  
11 treatment of Dr. Genthe’s opinions. *Tackett*, 180 F.3d at 1097 (If the evidence is  
12 susceptible to more than one rational interpretation, the court may not substitute its  
13 judgment for that of the ALJ).

14 **C. Brooke Sjostrom, LMHC**

15 The record includes a Psychological/Psychiatric Evaluation form authorizing  
16 Brooke Sjostrom, LMHC to release Plaintiff’s records and indicating that an  
17 evaluation was performed on September 22, 2015. Tr. 864-72. The form includes  
18 an opinion stating that Plaintiff had a marked limitation in the abilities to set  
19 realistic goals and plan independently and a moderate limitation in the abilities to  
20 understand, remember, and persist in tasks by following detailed instructions, to  
21 communicate and perform effectively in a work setting, to maintain appropriate  
22 behavior in a work setting, and to complete a normal work day and work week  
23 without interruptions from psychologically based symptoms. Tr. 868. The opinion  
24 concluded with the following statement:

25 At this time, symptoms do not appear severe enough that they would  
26 preclude [Plaintiff] from being able to participate in an entry-level  
27 employment setting. However, it is recommended that in addition to  
28 counseling, she be referred for psychotropic medication management

1 of mood and ADHD symptoms as they could potentially interfere with  
2 her reliability and ability to attend to the duties and responsibilities of  
3 a job.

4 Tr. 869. This form required the explaining professional's signature and includes a  
5 signature by Brooke Sjostrom and Dr. Genthe. Tr. 869.

6 The ALJ attributed the opinion to Brooke Sjostrom and gave it "considerable  
7 weight" finding it "is supportive of the assigned residual functional capacity." Tr.  
8 24. Plaintiff argues that while Brooke Sjostrom's opinion does not preclude entry-  
9 level employment, the ALJ overlooked her opinion that Plaintiff's ability to  
10 maintain employment was compromised citing to her statement recommending  
11 Plaintiff "be referred for psychotropic medication management of mood and  
12 ADHD symptoms as they could potentially interfere with her reliability and ability  
13 to attend to the duties and responsibilities of a job." ECF No. 13 at 17 *citing* Tr.  
14 869.

15 Plaintiff's argument amounts to a different interpretation of the statement. If  
16 the evidence is susceptible to more than one rational interpretation, the court may  
17 not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097. The  
18 ALJ read Brooke Sjostrom's statement to be that Plaintiff could perform work with  
19 some potential difficulties, which is consistent with the residual functional capacity  
20 determination in the ALJ's decision. Tr. 24. Plaintiff argues that the statement  
21 amounts to a finding that while Plaintiff could obtain a job, her impairments  
22 prevented her from sustaining or maintaining such employment. ECF No. 13 at  
23 17. Both are reasonable interpretations of the opinion. Therefore, the Court will  
24 not disturb the ALJ's determination.

## 25 **2. Lay Witness Statements**

26 Plaintiff argues that the ALJ failed to properly weigh the evidence submitted  
27 from her former foster parent.

28 On November 3, 2014, Plaintiff's former foster parent completed a third

1 party function report stating that he spent about ten hours a week with Plaintiff and  
2 had adopted three of her children. Tr. 341. The report includes statements  
3 referencing Plaintiff's difficulty with her moods and these moods affecting her  
4 personal care, her ability to concentrate, her ability to complete tasks, and her  
5 ability to get along with others. Tr. 341-48. The ALJ gave the third party function  
6 report only partial weight for two reasons: (1) "the close relationships between  
7 these people and the claimant, and the possibility that the reports were influenced  
8 in favor of the claimant by a desire to help the claimant cannot be entirely  
9 ignored"; and (2) "the claimant's abilities, as demonstrated by her activities of  
10 daily life and physical examination findings, do not show a greater limitation than  
11 assigned." Tr. 22.

12 "[F]riends and family members in a position to observe a claimant's  
13 symptoms and daily activities are competent to testify as to her condition." *Dodrill*  
14 *v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993). Lay witness testimony is  
15 "competent evidence" as to "how an impairment affects [a claimant's] ability to  
16 work." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050 (9th Cir. 2006). To  
17 reject evidence from a lay witness, the ALJ "must give reasons that are germane to  
18 each witness." *Dodrill*, 12 F.3d at 919.

19 Plaintiff challenges the ALJ's first reason for rejecting the statements, that  
20 the veracity of the lay witness is undermined by his close relationship to Plaintiff,  
21 by arguing that the ALJ failed to set forth any evidence that the former foster  
22 parent was anything "but objective in his observations." ECF No. 13 at 19. The  
23 Ninth Circuit has found that a close relationship with and a desire to help a  
24 claimant is a proper basis for rejecting lay witness testimony. *Greger v.*  
25 *Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006). This is in contrast to the Ninth  
26 Circuit finding that "[t]he fact that a lay witness is a family member cannot be a  
27 ground for rejecting his or her testimony." *Smolen v. Chater*, 80 F.3d 1273 (9th  
28 Cir. 1996). Courts have distinguished between these cases by finding that a close

1 relationship cannot be the *sole* reason a lay witness's statements are rejected. *See*  
2 *Rolland v. Colvin*, Case No. 2:15-cv-103-RMP, 2006 WL 1180198 (E.D. Wash.  
3 March 25, 2016).

4 Here, the ALJ provided a second reason for rejecting the witness statements,  
5 that "the claimant's abilities, as demonstrated by her activities of daily life and  
6 physical examination findings, do not show a greater limitation than assigned." Tr.  
7 22. Plaintiff failed to challenge this reason. ECF Nos. 13, 15. Therefore, the  
8 Court is not required to address the issue further. *See Carmickle v. Comm'r., Soc.*  
9 *Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008). The Ninth Circuit explained  
10 the necessity for providing specific argument:

11 The art of advocacy is not one of mystery. Our adversarial system  
12 relies on the advocates to inform the discussion and raise the issues  
13 to the court. Particularly on appeal, we have held firm against  
14 considering arguments that are not briefed. But the term "brief" in  
15 the appellate context does not mean opaque nor is it an exercise in  
16 issue spotting. However much we may importune lawyers to be  
17 brief and to get to the point, we have never suggested that they skip  
18 the substance of their argument in order to do so. It is no accident  
19 that the Federal Rules of Appellate Procedure require the opening  
20 brief to contain the "appellant's contentions and the reasons for  
21 them, with citations to the authorities and parts of the record on  
22 which the appellant relies." Fed. R. App. P. 28(a)(9)(A). We require  
23 contentions to be accompanied by reasons.

21 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003)<sup>3</sup>.

22 Moreover, the Ninth Circuit has repeatedly admonished that the court will not  
23 "manufacture arguments for an appellant" and therefore will not consider claims  
24 that were not actually argued in appellant's opening brief. *Greenwood v. Fed.*  
25 *Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994). Without finding that rejecting  
26

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27 <sup>3</sup>Under the current version of the Federal Rules of Appellate Procedure, the  
28 appropriate citation would be to FED. R. APP. P. 28(a)(8)(A).



1 the statements because of the close relationship between Plaintiff and the witness  
2 constituted an error, the Court finds that by failing to challenge the second reason  
3 Plaintiff effectively waived the issue.

### 4 **3. Plaintiff's Symptom Statements**

5 Plaintiff contests the ALJ's determination that Plaintiff's symptom  
6 statements were unreliable. ECF Nos. 13 at 9-12, 15.

7 It is generally the province of the ALJ to make determinations regarding the  
8 reliability of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the  
9 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,  
10 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,  
11 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear  
12 and convincing." *Smolen*, 80 F.3d at 1281; *Lester*, 81 F.3d at 834. "General  
13 findings are insufficient: rather the ALJ must identify what testimony is not  
14 credible and what evidence undermines the claimant's complaints." *Lester*, 81  
15 F.3d at 834.

16 The ALJ found Plaintiff's "statements concerning the intensity, persistence,  
17 and limiting effects of these symptoms are not entirely consistent with the medical  
18 evidence and other evidence in the record for the reasons explained in this  
19 decision." Tr. 22. The ALJ then provided the following four reasons for rejecting  
20 Plaintiff's symptom statements: (1) Plaintiff's "level of activity is minimally  
21 limited, and cannot be reconciled with the considerable severity alleged"; (2)  
22 Plaintiff's "significant history of noncompliance with treatment recommendations"  
23 suggests Plaintiff's limitations are less than alleged; (3) there was evidence  
24 Plaintiff had over-reported symptoms or malingered; and (4) the reported severity  
25 was not supported by the objective physical evidence. Tr. 22-23.

26 The ALJ's first reason for rejecting Plaintiff's symptom statements, that  
27 Plaintiff's level of activity was inconsistent with her reported severity of  
28 symptoms, is not specific, clear and convincing. A claimant's daily activities may

1 support rejecting her symptom statements if (1) the claimant’s activities contradict  
2 her other testimony, or (2) “the claimant is able to spend a substantial part of [her]  
3 day engaged in pursuits involving performance of physical functions that are  
4 transferable to a work setting.” *Orn*, 495 F.3d at 639 (citing *Fair v. Bowen*, 885  
5 F.2d 597, 603 (9th Cir. 1989)). “The ALJ must make ‘specific findings relating to  
6 [the daily] activities’ and their transferability to conclude that a claimant’s daily  
7 activities warrant an adverse credibility determination.” *Id.* (quoting *Burch v.*  
8 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)). A claimant need not be “utterly  
9 incapacitated” to be eligible for benefits. *Fair*, 885 F.2d at 603.

10 Here, the ALJ found that Plaintiff’s reported level of activity was minimally  
11 limited and “cannot be reconciled with the considerable severity alleged. Many of  
12 the activities the claimant performs are similar to activities performed in a variety  
13 of occupations.” Tr. 22. The ALJ cited Plaintiff’s activities of providing childcare  
14 for her infant, performing self-care, prepping meals, performing household chores,  
15 driving, leaving her home, and shopping. *Id.* While the ALJ concluded that these  
16 activities are similar to those performed in several occupations, she did not address  
17 the frequency Plaintiff performed these activities when compared to the frequency  
18 they would be required in a work setting. This is insufficient to meet the specific,  
19 clear and convincing standard. *Garrison*, 759 F.3d at 1016 (“We have repeatedly  
20 warned that ALJs must be especially cautious in concluding that daily activities are  
21 inconsistent with testimony about pain, because impairments that would  
22 unquestionably preclude work and all the pressures of a workplace environment  
23 will often be consistent with doing more than merely resting in bed all day.”)

24 The ALJ’s second reason for rejecting Plaintiff’s symptom statements, that  
25 Plaintiff’s noncompliance with treatment was inconsistent with her reported  
26 severity of symptoms, is specific, clear and convincing. Noncompliance with  
27 medical care or unexplained or inadequately explained reasons for failing to seek  
28 medical treatment cast doubt on a claimant’s subjective complaints. 20 C.F.R. §

1 416.930; *Fair*, 885 F.2d at 603; *Macri v. Chater*, 93 F.3d 540, 544 (9th Cir. 1996)  
2 (finding the ALJ’s decision to reject the claimant’s subjective pain testimony was  
3 supported by the fact that claimant was not taking pain medication). The ALJ  
4 provided multiple locations in the record demonstrating Plaintiff failed to take  
5 medications and follow through with treatment and found that Plaintiff “has not  
6 put forth full effort in retaining or recouping functional capacity,” and “this  
7 evidence suggest the claimant’s limitations are less than alleged, as one would  
8 expect strict compliance with medical directives given the alleged severity of  
9 symptoms.” Tr. 22.

10 First, Plaintiff argues that the ALJ was required to consider her reasons for  
11 noncompliance. ECF No. 13 at 10-11. However, Plaintiff did not present any  
12 reason for noncompliance to the ALJ. In fact, at the hearing, she testified that “I  
13 have done my work trying to help myself.” Tr. 56. In her briefing, she points to a  
14 single treatment note stating that Plaintiff “did not tolerate oral prednisone well,”  
15 but it did not state that was a reason she refused a steroid injection. Tr. 669.

16 Second, Plaintiff argues that the ALJ should not have rejected her symptom  
17 statements regarding her mental health due to a lack of treatment. ECF No. 13 at  
18 11 *citing Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) (it is a  
19 “questionable practice to chastise one with a mental impairment for the exercise of  
20 poor judgment in seeking rehabilitation.”). Regardless, this does not negate  
21 Plaintiff’s unexplained reasons for failing to follow through with treating her  
22 reported physical symptoms, especially those causing pain. Therefore, Plaintiff’s  
23 failure to follow prescribed treatment is a specific, clear and convincing reason to  
24 reject her physical symptom statements.

25 The ALJ’s third reason for rejecting Plaintiff’s symptom statements, that  
26 there was evidence she had over-reported her symptoms or malingered, is specific,  
27 clear and convincing. A finding that plaintiff engages in exaggeration is a valid  
28 reason to reject a claimant’s allegations of severity of symptoms. *See Tonapetyan*

1 *v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). A September 29, 2016 evaluation  
2 included personality tests that “raise[d] concerns about over-reporting and possible  
3 malingering.” Tr. 827. The ALJ cited the 2014 evaluation by Dr. Genthe, which  
4 included a Personality Assessment Inventory that indicated a possibility “that the  
5 clinical scales may overrepresent or exaggerate the actual degree of  
6 psychopathology,” and that Plaintiff “tended to endorse items that present an  
7 unfavorable impression or represent extremely bizarre and unlikely symptoms.”  
8 Tr. 658. Additionally, the ALJ cited an April 1, 2010 evaluation by Dr. Genthe in  
9 which he stated that “[f]rom the get go, [Plaintiff] had a poor attitude, making  
10 grimaces when asked to complete some paperwork. She was overall uncooperative  
11 and argumentative. She would not clearly answer questions, provide support for  
12 claims she made, or question the need for some of the questions asked.” Tr. 501.  
13 Dr. Genthe thought that Plaintiff may have been under the influence of something  
14 and refused to provide a diagnosis. *Id.* While the ALJ did not make a finding of  
15 malingering, which requires affirmative evidence, *Smolen*, 80 F.3d at 1283-84, she  
16 provided multiple citations to the record demonstrating that Plaintiff was over-  
17 reporting in her personality testing. Therefore, the ALJ’s reason is supported by  
18 substantial evidence and meets the specific, clear and convincing standard.

19 The ALJ’s fourth reason for rejecting Plaintiff’s symptom statements, that  
20 the objective physical evidence did not support the reported severity of symptoms,  
21 is specific, clear and convincing. Objective medical evidence is a “relevant factor  
22 in determining the severity of the claimant’s pain and its disabling effects,” but it  
23 cannot serve as the only reason for rejecting a claimant’s credibility. *Rollins v.*  
24 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). Specifically, the ALJ relied upon  
25 Plaintiff’s normal nerve conduction studies as undermining her complaints of hand  
26 and wrist pain. Tr. 23 *citing* Tr. 669. Additionally, the ALJ found that despite  
27 complaints of foot pain, Plaintiff’s gait was normal in the record. *Id. citing* Tr.  
28 499, 670, 836, 845, 1178, 1204. The ALJ acknowledged that the normal gait

1 observations were not universal throughout the record, but they did call into  
2 question Plaintiff's testimony regarding the persistence of her symptoms. Tr. 23.  
3 Here, the ALJ provided specific citations to the record that undermined Plaintiff's  
4 reported severity and persistence of symptoms. Therefore, this reason meets the  
5 specific, clear and convincing standard.

6 In conclusion, the ALJ provided specific, clear and convincing reasons to  
7 support her determination that Plaintiff's symptom statements were unreliable. *See*  
8 *Carmickle*, 533 F.3d at 1163 (upholding an adverse credibility finding where the  
9 ALJ provided four reasons to discredit the claimant, two of which were invalid);  
10 *Batson*, 359 F.3d at 1197 (affirming a credibility finding where one of several  
11 reasons was unsupported by the record); *Tommasetti*, 533 F.3d at 1038 (an error is  
12 harmless when "it is clear from the record that the . . . error was inconsequential to  
13 the ultimate nondisability determination").

#### 14 CONCLUSION

15 Having reviewed the record and the ALJ's findings, the Court finds the  
16 ALJ's decision is supported by substantial evidence and free of harmful legal error.  
17 Accordingly, **IT IS ORDERED:**

18 1. Defendant's Motion for Summary Judgment, **ECF No. 14**, is  
19 **GRANTED.**

20 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **DENIED.**

21 The District Court Executive is directed to file this Order and provide a copy  
22 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**  
23 **and the file shall be CLOSED.**

24 DATED July 21, 2020.



A handwritten signature in black ink, appearing to read "M", is written over a horizontal line.

26 JOHN T. RODGERS  
27 UNITED STATES MAGISTRATE JUDGE  
28